JR LINCKS COLLEGE OF HIGHER EDUCATION A

v.

MAJLIS PERBANDARAN MELAKA

COURT OF APPEAL, PUTRAJAYA B
ZALEHA ZAHARI JCA
ZULKEFLI MAKINUDIN JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: M-02-330-1999]
28 FEBRUARY 2008 C

CIVIL PROCEDURE: *Amendment - Parties - Amendment of name of plaintiff in writ of summons and statement of claim - Whether defendant not misled by mistake and had full knowledge of plaintiff's real identity - Locus standi - Whether proposed amendment a substitution of a party* D

This was an appeal by the appellant/plaintiff against the High Court's refusal to grant its application for leave to amend the name of the plaintiff in the writ of summons and the statement of claim. The plaintiff, a college of higher learning conducting its business at one Bastion House in Malacca, commenced an action against the respondent/defendant seeking damages and certain reliefs following the defendant's direction prohibiting the plaintiff from continuing to occupy Bastion House. The defendant's new solicitors – its previous solicitors having withdrawn from the case – filed an application to strike out the plaintiff's claim for want of *locus standi*. The plaintiff then applied to amend its name from "JR Lincks College of Higher Education" to "JR Lincks Educational Consultants Sdn Bhd" on the ground that the mistake it sought to correct was a genuine mistake and only a misnomer. The plaintiff contended that the defendant had not been misled by this mistake as it had full knowledge of the plaintiff's real identity. The defendant, however, submitted that the party cited as the plaintiff was not a legal identity and, thus, the action filed against it was a nullity. It was further argued that the proposed amendment was not a correction exercise but a substitution of a party. The High Court judge accepted the defendant's argument and dismissed the plaintiff's application, resulting in the present appeal. E F G H I

Held (allowing the appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) In the circumstances of the present case, there could be no doubt that the plaintiff could easily be identified as the aggrieved party/entity the defendant had dealt with relating to the matters stated in the pleadings. The name used, "JR Lincks College of Higher Education" instead of "JR Lincks Educational Consultants Sdn Bhd", was clearly usage of a wrong name; it was but a misnomer and did not involve the substitution of a new party. Further, taking into consideration the conduct of, and steps taken by, the defendant in this case, it was unlikely that there was any doubt in the defendant's mind when it received the writ that the case concerned the plaintiff. From the start it would appear that the defendant clearly knew whom it was dealing with. The defendant's previous solicitors had filed an unconditional appearance, a statement of defence and an amended statement of defence. The statement of agreed facts was also agreed upon, as well as the issue that the court was required to determine. Not only that, the hearing was well advanced before this technical challenge as to the *locus standi* and entity of the plaintiff was raised. This clearly was an afterthought brought up by the defendant's new solicitors, who thought it prudent to attempt at that advanced stage to have the case struck out on a technicality rather than have the matter fully adjudicated on its merits. In these circumstances, the defendant could not have been, and was not, confused. The identity of the party suing was clearly evident *ie*, the educational college situated at Bastion House. The defendant's suggestion that it maintained some doubt as to the entity suing it was fanciful and ought to be rejected. (paras 10, 11 & 12)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu/plaintif terhadap keengganan Mahkamah Tinggi memberikan kebenaran kepadanya untuk meminda nama plaintif pada writ saman dan penyata tuntutannya. Plaintif, sebuah kolej pengajian tinggi yang berpengkalan di Bastion House, Melaka, telah memulakan tindakan terhadap responden/defendan bagi menuntut gantirugi dan lain-lain relif ekoran satu arahan yang dikeluarkan oleh defendan melarangnya dari menduduki Bastion House. Peguamcara defendan yang baru – peguamcara terdahulu telah menarik diri – telah memfail tindakan untuk membatalkan

tuntutan plaintif kerana ketiadaan *locus standi*. Plaintif kemudian memohon untuk meminda namanya dari "JR Lincks College of Higher Education" kepada "JR Lincks Educational Consultants Sdn Bhd" atas alasan bahawa kesilapan yang hendak dibetulkan adalah satu kesilapan yang tak disengajakan dan hanyalah suatu kesalahan nama. Plaintif berhujah bahawa defendan tidak diprejudis oleh kesilapan, kerana ia mengetahui sepenuhnya identiti sebenar plaintif. Defendan, bagaimanapun, berhujah bahawa pihak yang dinamakan sebagai plaintif bukan suatu entiti di sisi undang-undang, sekaligus menjadikan tindakan yang difailkan terhadapnya suatu nullity. Dihujahkan lagi bahawa pindaan yang dicadangkan bukan semata-mata satu pembetulan tetapi adalah satu penggantian pihak. Hakim Mahkamah Tinggi telah menerima hujah defendan dan menolak permohonan plaintif, sekaligus mencetuskan rayuan di sini.

Diputuskan (membenarkan rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Dalam halkeadaan kes di sini, tiada keraguan bahawa plaintif boleh dikenalpasti dengan mudah sebagai pihak terkilan/entiti yang defendan berurusan dengannya berkaitan perkara-perkara yang berbangkit di dalam pliding. Nama yang digunakan, "JR Lincks College of Higher Education", adalah jelas satu penggunaan nama yang salah berbanding nama yang sepatutnya digunakan "JR Lincks Educational Consultants Sdn Bhd"; ia hanyalah satu misnomer dan tidak melibatkan penggantian satu pihak yang baru. Selain itu, mengambilkira kelakuan defendan dan langkah-langkah yang diambil olehnya dalam kes ini, adalah tidak mungkin bahawa wujud keraguan di fikiran defendan ketika menerima writ bahawa kes adalah menyangkuti plaintif. Sejak dari awal lagi defendan kelihatan jelas mengetahui dengan siapa ia sebenarnya berurusan. Peguamcara defendan terdahulu telah memfailkan kehadiran tak bersyarat, penyata pembelaan serta penyata pembelaan terpinda. Penyata fakta bersama juga telah dipersetujui, dan begitu juga dengan isu yang perlu diputuskan oleh mahkamah. Bukan itu sahaja, pendengaran telah pun berjalan jauh sebelum cabaran teknikal terhadap *locus standi* dan entiti plaintif ini dibangkitkan. Ini tidak lain dari satu afterthought oleh peguamcara baru defendan, yang merasainya wajar untuk cuba membatalkan kes di saat yang begitu lewat berdasarkan persoalan teknikal bagi mengelakkan persoalan diadili di atas

merit. Dalam halkeadaan sedemikian, defendan tidak mungkin, dan adalah sebenarnya tidak terkeliru. Identiti pihak yang menuntut adalah jelas, iaitu kolej pengajian yang bertempat di Bastion House. Pengataan defendan bahawa ia merasa ragu-ragu tentang entiti pihak yang mendakwa tidak berasas dan harus ditolak.

Case(s) referred to:
Whittman v. W J Daniel & Co Ltd [1961] 3 All ER 796 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 16(5), 121
Rules of the High Court 1980, O. 20 r. 5(3), O. 25 r. 5

For the appellant - Malik Imtiaz Sarwar (Amelly Kok with him); M/s Thomas Philip
For the respondent - Hamid Sultan Abu Bakar (Sugandra Rao Naidu & Mohd Mustafa with him); M/s J Azmi & Assocs

[Appeal from High Court, Melaka; Civil Suit No: 22-58-1991]

Reported by Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] This is an appeal against the High Court judge's refusal to grant the plaintiff's (appellant before us) application for leave to amend the name of the plaintiff in the writ of summons and the statement of claim. We allowed the appeal with costs on 14 February 2007. Our reasons are as follows:

[2] The plaintiff is a college of higher learning which conducted its business at Bastion House, Jalan Kota, Melaka. The plaintiff commenced proceedings on 26 August 1991 against the defendant (respondent before us) by which action they sought, *inter alia*, for declaratory and injunctive relief, damages for trespass, as well as other reliefs, following the direction of the defendant prohibiting the plaintiff from continuing to occupy Bastion House Malacca. At the same time the plaintiff also filed an application for interim injunction pending disposal of the action.

[3] The defendant filed an unconditional appearance on 27 May 1991. Defence was filed on 16 August 1991. Both parties subsequently amended their statement of claim and statement of defence. Parties proceeded to take directions from the High

Court pursuant to the summons for directions filed. It is on record that parties had, by way of statement of agreed facts, agreed that "JR Lincks College of Higher Education" was the trading name of "JR Lincks Educational Consultants Sdn Bhd" and that "JR Lincks Educational Consultants Sdn Bhd" wholly owned "JR Lincks College of Higher Education". We took note of the fact that included in the agreed bundle of documents is a letter of approval dated 5 March 1990 issued by the Chief Registrar of Shools and Teachers of the Ministry of Education which letter is addressed to "JR Lincks Educational Consultants Sdn Bhd".

[4] Parties had agreed to rest their case based on written submissions without calling witnesses, and that submissions would be limited to one issue only, ie, whether the Chief Minister of Malacca had in any way interfered with the operation of the Bastion House?

[5] The action was set down for trial, fixed for hearing on 3 December 1996 (adjourned), 3 January 1997, 26 February 1997 and 22 April 1997, then 25 March 1998. Subsequently, on the hearing date of 1 June 1998, the defendant's solicitors applied for an adjournment on the ground that they were withdrawing themselves as solicitors. On the subsequent hearing date, 23 June 1998, the defendant's new solicitors, Tetuan J Azmi & Associates, informed the court that they had filed an application to strike out the plaintiff's claim for want of *locus standi*. The plaintiff then, on 16 July 1998, filed encl. (112), an application to amend their name from "JR Lincks College of Higher Education" to "JR Lincks Educational Consultants Sdn Bhd" which application was fixed for hearing on 22 July 1998, ie, the same date as the defendant's application to strike out the plaintiff's suit.

[6] The ground upon which the plaintiff's application was grounded was that the mistake which they sought to correct by way of an amendment was a genuine mistake and but a misnomer. That the name "JR Lincks College of Higher Education" is a trade name, whilst "JR Lincks Educational Consultants Sdn Bhd" is the company's name. According to the plaintiff the defendant had not been misled by this mistake, nor were they taken by surprise as they had full knowledge as to the real identity of the plaintiff.

[7] In objecting to the application to amend the defendant's argument was that the plaintiff is not a legal entity from the plaintiff's own admission of "JR Lincks College of Higher Education" being their trade name, and had incorrectly stated their

A trading name, "JR Lincks College of Higher Education" instead of "JR Lincks Educational Consultants Sdn Bhd" as the plaintiff. As the party cited as plaintiff is not a legal entity, the action filed against the defendant was accordingly a nullity. It was further argued that the proposed amendment was not a correction
B exercise, but a substitution of a party. He then pointed out that s. 16(5) of the Companies Act 1965 requires a company to sue and be sued in its own name, and that s. 121 then provides that a company is subject to penal consequences if it were to use any other name. He was of the view that O. 25 r. 5 of the Rules of
C the High Court 1980 (the rules) does not apply to a case of neglect.

[8] The High Court judge accepted the defendant's argument that the proposed amendment was not a correction exercise and/
D or misnomer, but a substitution of a party. He held that the plaintiff had not advanced cogent reasons to support the application for amendment. As the entity cited as plaintiff was admittedly not in existence from commencement of the action, he then dismissed the plaintiff's application to amend with costs.
E Hence this appeal.

[9] Order 20 r. 5(3) of the rules provides that an amendment to correct the name of a party may be allowed under para. (2) notwithstanding that the effect of the amendment will be to
F substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued. The applicable principle as provided in
G O. 20 r. 5(3) of the rules is that the court would allow an amendment to correct the name of a party even if it amounts to substitution of parties if it was a genuine mistake which did not mislead or cause any reasonable doubt as to the entity suing or being sued. The test to be applied is, can the intending plaintiff
H or defendant be identified by reference to a description which is specific to that particular case? If the answer is "Yes", then an amendment can be allowed even where the correction involves substituting a different name altogether, and the name of a separate legal entity, even though this may be equivalent to
I substituting a new party. In *Whittman v. W J Daniel & Co Ltd* [1961] 3 All ER 796 the English Court of Appeal allowed an amendment to correct the name of the defendant which was wrongly stated as "WJ Daniels and Company (a firm)" instead of

"W J Daniel and Company Ltd". It was in that case held that they could be no doubt in the mind of the defendant when they got the writ that it was they whom the plaintiff intended to sue and that she had simply got their name wrong. A

[10] We are of the view that in the circumstances of the present case there can be no doubt that the plaintiff could easily be identified as the aggrieved party/entity which the defendant had dealt with relating to the matters stated in the pleadings. The name used, "JR Lincks College of Higher Education" instead of "JR Lincks Educational Consultants Sdn Bhd", was clearly usage of a wrong name; that it was but a misnomer and did not involve the substitution of a new party. B C

[11] Further taking into consideration the conduct of and steps taken by the defendant in this case, it was unlikely that there was any doubt in the mind of the defendant when they received the writ that the case concerned the plaintiff. From the start it would appear that the defendant clearly knew whom they were dealing with. Their previous solicitors had filed an unconditional appearance, a statement of defence, then, an amended statement of defence. The statement of agreed facts was also agreed upon, as well as to the Issue which the court was required to determine. Not only that, the hearing was well advanced before this technical challenge as to *locus standi* and entity of the plaintiff was raised. This clearly was an after thought brought up by the defendant's new solicitors, who thought it prudent to attempt at that advanced stage to have the case struck out on a technicality rather than have the matter fully adjudicated on its merits based on the facts and documents that had already been agreed upon. D E F

[12] In these circumstances we are of the view that the defendant could not have been, and was not, confused. The identity of the party suing was clearly evident *ie*, the educational college situated at Bastion House. The defendant's suggestion, having responded in the manner they did, although they had knowledge of the matters in issue, maintained some doubt as the entity suing them, is fanciful, and we reject it. G H

[13] The appeal was accordingly allowed with costs and we directed the deposit to be paid to the appellants on account of taxed costs. I